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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jessica Miracle; et al.,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as
Arizona Secretary of State,

Defendant.

Case No.: 2:19-cv-04694-SRB

**AMICUS BRIEF OF THE
SPEAKER OF THE ARIZONA
HOUSE OF REPRESENTATIVES
AND PRESIDENT OF THE
ARIZONA SENATE**

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AUTHORITY TO FILE AN AMICUS BRIEF

Pursuant to leave granted by the Court in the order filed September 20, 2019, the Speaker of the Arizona House of Representatives and President of the Arizona Senate submit the following amicus brief:

1. THE COURT LACKS SUBJECT MATTER JURISDICTION FOR LACK OF INJURY-IN-FACT AND CAUSATION.

The injuries Plaintiffs complain of – taken as true for analysis – do not come from A.R.S. § 19-118(E). If they come at all, they come from state trial-court mismanagement of a case filed challenging initiative petitions. We know it is possible for an Arizona trial court to manage an initiative-petition challenge case invoking the remedy provided in A.R.S. § 19-118(E) without the sting Plaintiffs claim they will suffer in the future, because such was the case in *Stanwitz v. Reagan*, 245 Ariz. 344 (2018). As the Arizona Supreme Court noted in that case,

Further, the Committee's suggestion that it was unduly burdened by Petitioners' subpoenas to circulators is unpersuasive. Petitioners subpoenaed only fifteen circulators to testify—fewer than one percent (0.6%) of the Committee's petition circulators—and the Committee received notice of the subpoenas eleven days before the evidentiary hearing. Section 19-118(C)'s application here demonstrates, rather than refutes, the constitutional application of the statute's disqualification remedy.¹

Id. at 350, ¶ 24.

In general, initiative-petition challenge cases have inherent case-management difficulties. They stem from the acute compression of the schedule for processing such cases in the state court system. Such compression results from the practical deadlines imposed by the need to print the ballots, a compression that in recent years has been

¹ The Arizona Supreme Court cited to A.R.S. § 19-118(C), which in its last session the Arizona Legislature re-codified to A.R.S. § 19-118(E). *See* 2019 ARIZ. SESS. LAWS (54th Leg., 1st Reg.Sess.) Ch. 315, § 3.

1 exacerbated by the constrictions caused by early balloting, and the need to mail out ballots
2 to Arizonans serving in the military and naval forces overseas.

3 To manage such time constrictions, the Legislature has set strict time limits for
4 filing such cases, bringing them to trial, and appealing them directly to the Arizona
5 Supreme Court. *See, e.g., Transportation Infrastructure Moving Arizona's Economy v.*
6 *Brewer*, 219 Ariz. 207 (2008) (describing the time constrictions and deadlines).

7 The role of circulators is often central to such cases. In *Stanwitz*, the Arizona
8 Supreme Court described such centrality as follows:

9 To provide context for the Committee's constitutional challenge, we note that
10 the Arizona Constitution specifically envisions a signature verification
11 requirement, Ariz. Const. art. 4, pt. 1, § 1(9), and this Court has observed that
12 “[t]he circulator is the only person in the process who is required to make a
13 sworn statement and is, therefore, the person under the greatest compulsion
14 to lend credibility to the process.” *W. Devcor*, 168 Ariz. at 432, 814 P.2d at
15 773. Consequently, because the integrity of the signature collection process
16 is singularly dependent on the probity of circulators, “statutory circulation
17 procedures” are critical “to reduce the number of erroneous signatures, guard
18 against misrepresentations, and confirm that signatures were obtained
according to law.” *Brousseau v. Fitzgerald*, 138 Ariz. 453, 456, 675 P.2d 713,
716 (1984) (discussing candidate nominating petitions); *cf. Arrett v. Bower*,
237 Ariz. 74, 79 ¶ 17, 345 P.3d 129, 134 (App. 2015) (concluding that a
petition serial number requirement was “critical” to ensuring the integrity of
the referendum process).

19 245 Ariz. at 349, ¶ 18.

20 To ensure that a circulator appears at the trial of an initiative-petition challenge
21 case, the Legislature adopted A.R.S. § 19-118, which sets forth the following procedures
22 for registration of circulators, consent to jurisdiction, and service of process on them:

23 Section 19-118(A) provides that “[a]ll circulators who are not residents of
24 this state and, for statewide ballot measures only, all paid circulators must
25 register as circulators with the secretary of state before circulating petitions
26 pursuant to this title.” Section 19-118(B)(1) requires that the circulator
consent to the jurisdiction of Arizona courts “in resolving any disputes
concerning the circulation of petitions by that circulator,” and § 19-

118(B)(2) mandates that the circulator designate an Arizona address “at which the circulator will accept service of process related to disputes concerning circulation of that circulator's petitions.” “Service of process is effected under this section by delivering a copy of the subpoena to that person individually or by leaving a copy of the subpoena at the address designated by the circulator with a person of suitable age.” § 19-118(B)(2). Thus, § 19-118, which requires certain circulators to register before gathering signatures for ballot measures and creates a cause of action to challenge the eligibility of petition circulators, is an exercise of legislative authority to regulate the ballot measure process.

Stanwitz, 245 Ariz. at 348-49, ¶ 15.

It is critical to note that a plaintiff in an initiative-petition challenge case thus has a right to compel out-of-state and paid circulators to appear and testify at trial, regardless of whether the remedy for non-compliance is contempt or the disqualification of petition sheets wrought by A.R.S. § 19-118(E).

A.R.S. § 19-118(E) did not repeal the Arizona Rules of Civil Procedure, nor could it do so under the separation of powers doctrine embedded in Article III of the Arizona Constitution. *See Bertelson v. Sacks Tierney, P.A.*, 204 Ariz. 124, 129, ¶¶ 21-22 (App. 2002) (“The legislature may not enact a statutory rule that conflict[s with] or ... tends to engulf a general rule . . . adopted by the court pursuant to its exclusive power to make [procedural] rules.”)(internal quotation marks omitted.)

The Rules provide an Arizona trial judge with a number of procedural devices to manage an initiative-petition challenge case, and prevent abuse. The first, and most prominent, is Rule 11, which requires the signature of a plaintiff’s counsel on all pleadings and filings made in the case. Under Rule 11(b), counsel’s signature represents the following to the trial court:

By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

1 (2) the claims, defenses, and other legal contentions are warranted by
2 existing law or by a nonfrivolous argument for extending, modifying, or
reversing existing law or for establishing new law.

3 (3) the factual contentions have evidentiary support or, if specifically so
4 identified, will likely have evidentiary support after a reasonable
opportunity for further investigation or discovery; and

5 (4) the denials of factual contentions are warranted on the evidence or, if
6 specifically so identified, are reasonably based on belief or a lack of
information.

7 Rule 11(b) thus creates an effective tool to prevent abuse of the system, but by no
8 means is it the only tool found in the Arizona Rules of Civil Procedure. Rule 45(e)
9 provides for a motion to quash a burdensome subpoena. Rule 43(e) allows a witness to
10 testify by telephone with trial-court approval. Rule 16(d) gives the trial court enormous
11 powers to manage and streamline a case, including the power to eliminate non-meritorious
12 claims or defenses. There also is the possibility of an unclean hands defense against a
13 plaintiff who abused the subpoena power.

14 All of the burdens Plaintiffs complain of thus stem from poor case management.
15 They do not stem from the remedy provided by A.R.S. § 19-118(E). Otherwise, we would
16 have to suppose that a circulator who might be tempted to disobey a lawful subpoena, not
17 appear, and accept the risk of contempt, would feel more compulsion to appear if the
18 remedy were enhanced beyond mere contempt to disqualification of petition sheets.
19 When stripped to its essence, that is really what Plaintiffs argue – that the Constitution
20 prevents the Legislature from enhancing the penalty for a circulator's non-appearance
21 from contempt to disqualification of petition sheets. The duties to register, appoint a place
22 for service, and appear at trial all exist regardless of the strength of the sanction for non-
23 appearance, and the burdens resulting from poor case management also would continue
24 to exist regardless of the strength of the sanction. We must assume a circulator will follow
25 the law and appear regardless of whether the penalty for disobedience is large or small.

26 That leads us to basic Article III requirements for filing suit in federal court. One

1 of the most basic is injury-in-fact actually caused by the acts complained of. As the
 2 United States Supreme Court has described it,

3 First and foremost, there must be alleged (and ultimately proved) an “injury
 4 in fact” —a harm suffered by the plaintiff that is “concrete” and “actual or
 5 imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be
 6 causation—a fairly traceable connection between the plaintiff’s injury and the
 7 complained-of conduct of the defendant. And third, there must be
 8 redressability—a likelihood that the requested relief will redress the alleged
 9 injury. This triad of injury in fact, causation, and redressability⁵ constitutes
 10 the core of Article III’s case-or-controversy requirement, and the party
 11 invoking federal jurisdiction bears the burden of establishing its existence.

12 *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998) (internal
 13 citations omitted.)

14 Consideration of what would happen if this Court were to enjoin enforcement of
 15 the sanction provided by A.R.S. § 19-118(E) makes plain that this law’s sanction actually
 16 causes none of the injuries Plaintiffs have complained about. To wit: If an injunction
 17 were issued suspending the sanction, a plaintiff in an initiative-petition challenge case
 18 would still have the right to subpoena circulators to appear at trial, and still could subpoena
 19 as many as were necessary to prove the case, the circulators would still have the obligation
 20 of appearing at trial, and they would incur all the burdens they complain of – whether
 21 fanciful or real – regardless of this Court’s injunction. The only difference is that a
 22 plaintiff would have one less remedy for non-appearance. The remedy of contempt of
 23 court would still remain, and it would be enforceable because the circulators consented to
 24 jurisdiction and consented to service at the location they noticed in their registration.
 25 Thus, the circulator’s duty to obey a lawful order of an Arizona court to appear and testify
 26 at trial would still remain fully intact. That is really what Plaintiffs complain about, but
 the United States Constitution works no interference with such duty.

1 **2. GOOD REASON EXISTS TO DISTINGUISH BETWEEN CANDIDATE-**
 2 **PETITION REQUIREMENTS AND INITIATIVE-PETITION**
 3 **REQUIREMENTS.**

4 At oral argument held last September 25, the Court noted a distinction between
 5 initiative-petitions and candidate-petitions that the Speaker and President want to develop
 6 further, because it aligns with their own experience. That is the permanence of initiated
 7 laws. Candidates are elected to a term. Initiated laws last until repealed by the electorate.
 8 The cases and authorities relating to this issue were developed in the briefing, and
 9 analyzed at oral argument. We do not revisit their technicalities or applications. We
 10 develop here a policy distinction, one that we find compelling.

11 The concept of checks-and-balances illustrates this compelling distinction between
 12 candidate-petitions and initiative-petitions. As Madison wrote in the first paragraph of
 13 Federalist No. 51,

14 To what expedient, then, shall we finally resort, for maintaining in practice
 15 the necessary partition of power among the several departments, as laid down
 16 in the Constitution? The only answer that can be given is, that as all these
 17 exterior provisions are found to be inadequate, the defect must be supplied,
 18 by so contriving the interior structure of the government as that its several
 19 constituent parts may, by their mutual relations, be the means of keeping each
 20 other in their proper places.

21 James Madison, THE FEDERALIST PAPERS at 320 (Clinton Rossiter ed., 1961).

22 If the electorate makes a mistake in the election of a candidate, the Arizona
 23 Constitution provides a number of checks and balances to ameliorate the mistake,
 24 ultimately including impeachment and removal from office, as was the case with
 25 Governor Mechem. What's more, the exercise of power is diffused in the Arizona
 26 Constitution. A state senator is one of 30, and a state representative one of 60. The
 nomination and subsequent election of a state legislator is far from itself a change in law,
 much less a voter-protected one. Once elected, that legislator must draft and introduce a

1 bill, the presiding officer of the chamber must assign the bill to a committee, the
2 sponsoring legislator must convince a committee chairman of the bill's merits in order for
3 the bill to be agendized, a majority of a committee must support the bill, then a majority
4 of the chamber's legislators must also support it. The same process must then occur in
5 the opposite chamber. If unsuccessful at any point in this process, the legislation fails and
6 no change in the law occurs. But even if successful through this process, the Governor
7 must see the bill's merits and sign it for it to become law. Even after all this, the changed
8 law is still subject to potential referendum and future amendment or repeal by a simple
9 majority, and the law of course is subject to judicial review for constitutionality.

10 Turning to the executive branch, its powers are divided initially among the five
11 main constitutional officers – governor, secretary of state, attorney general, treasurer, and
12 public-instruction superintendent – and then the executive power is further fractured and
13 distributed among numerous state boards and commissions; for example, to the Board of
14 Regents, the State Board of Education, the Board of Pardons and Paroles, the Game and
15 Fish Commission, the Transportation Board, and so on.

16 Thus, the concern about access to the ballot is not as acute when it comes to
17 candidates for the Legislature or the executive branch, because the effect of a mistake is
18 not as sharp, and many remedies exist to check it or to limit the damage resulting from a
19 poor choice.

20 The initiative power is different. As the Court noted, once exercised, the results
21 are permanent – or at least remain on the books and are enforced until a later electorate
22 repeals or amends to correct an error. Apart from the electorate, the only check is judicial
23 review, and that of course is limited to constitutionality and does not concern itself with
24 the wisdom or effectiveness of a law or correction of what experience might prove to be
25 policy mistakes. The Legislature has no power to repeal an initiated law, and only limited
26 power to amend it to further its purposes, which must be passed by a three-fourths

majority roll-call vote in both Houses. ARIZ.CONST. art. 4, pt. 1, §§ 1(6)(B) and 1(6)(C).

The concern is not the people's reservation of the right to initiate laws – Legislators take an oath to uphold the Arizona Constitution, and anyone with even a passing knowledge of it realizes that the citizens of Arizona reserved the initiative power to themselves in art. 4, pt. 1, § 1, when they adopted the Arizona Constitution more than a hundred years ago. We applaud that reservation.

Experience has shown, however, that an unwritten law exists in human affairs that no one can repeal -- that is the law of unintended consequences. What seems right and proper by today's lights, future experience might prove to be disastrous. History is replete with examples that need not be cited, because the truth of this law is so evident in actual experience. This unwritten law does not hang from any ideological peg. It hangs from human nature, and our condition of being able to peer only dimly into the future.

This unwritten law thus cautions that the power of initiative be exercised prudently and carefully, for the remedy for mistake is clumsy at best, if it exists at all. It provides a sensible reason to distinguish between candidate-petitions and initiative-petitions. It shows a healthy respect for the enormity and permanence of the power to be exercised, and a recognition of a certain pragmatism in human affairs concerning the inherent limitations resulting from the unforeseeability of consequences. This distinction does not evince a hostility to the reservation of power to the people to initiate laws. Rather, it aligns with Judge Learned Hand's concept of the spirit of American liberty, which is one that is "not too sure that it is right . . . which seeks to understand the mind of other men and women; . . . [and] which weighs their interests alongside its own without bias"²

² Learned Hand, "*I am an American Speech*," given at New York, New York, on May 20, 1945, *reprinted in* William Safire, *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* at 63 (1992).

1 **3. CONCLUSION.**

2 A.R.S. § 19-118(E) does not cause the injuries complained of, if they are genuine
 3 and can be proven. Such injuries, if real, are caused by poor trial-court case management.
 4 Without an injury in fact resulting from the statute the enforcement of which Plaintiffs
 5 seek to enjoin, this Court – as an Article III court – does not have subject-matter
 6 jurisdiction to hear the lawsuit. Experience has shown good grounds for distinguishing
 7 between candidate-petitions and initiative-petitions. The checks and balances that exist
 8 for the former do not exist for the latter, and initiated laws are permanent, save for
 9 modification or repeal by the electorate itself.

10
 11 RESPECTFULLY SUBMITTED on October 7, 2019.

12
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